IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DORIS ISBELL and JAMES SCHNEIDER,

Plaintiffs,

vs.

ALLSTATE INSURANCE COMPANY,

Defendant. **No. 01-CV-00252-DRH**

MEMORANDUM & ORDER

HERNDON, District Judge:

I. Introduction

Doris Isbell and James Schneider had been working for Allstate Insurance Company ("Allstate") for more than 14 and 15 years respectively as employee insurance agents when Allstate, as part of a restructuring of its sales force, abolished their job classification. In connection with that restructuring, Isbell and Schneider filed the instant lawsuit alleging Allstate unlawfully discriminated against them in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), **29 U.S.C. §§ 621 *et seq.***, and the Employee Retirement Income Security Act ("ERISA"), **29 U.S.C. §§ 1140 *et seq.*** (Isbell's Fourth Amended Complaint, No. 01-CV-0252, Doc. 48; Schneider's Complaint, No. 01-CV-0655, Doc. 1). Both Plaintiffs further claim Allstate unlawfully retaliated against them in violation of the Americans with Disabilities Act ("ADA"), **42 U.S.C. §§ 12101 *et seq.***, Title VII of the Civil Rights Act

of 1964, **42 U.S.C. § 2000e**, ADEA, and ERISA.[1]

Now before this Court is Defendant's combined motion for summary judgment (Doc. 187). Plaintiffs oppose this motion (Doc. 190). Plaintiffs also filed a motion to amend and supplement their opposition (Doc. 269). Defendant opposes this motion (Doc. 280). For the reasons set forth below, the Court grants in part and denies in part Defendant's motion for summary judgment and grants Plaintiffs' motion to supplement their opposition.

II. Facts[2]

Today Allstate markets its insurance primarily through a nationwide network of approximately 11,000 exclusive agent independent contractors (Def.'s Ex. 1 at ¶ 2).[3] The structure of the Allstate agent network, however, has evolved over the years to allow the company to adapt to the changing marketplace for insurance (*Id.*)

Prior to 1984, Allstate sold its insurance products exclusively through employee agents located in Sears retail stores or in local sales offices known as

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[1]On Defendant's motion for summary judgment directed at Isbell's Fourth Amended Complaint (Doc. 48), the Court dismissed Isbell's claims for retaliation under both federal and state law (Doc. 177).

[2]The parties filed a joint statement of undisputed material facts that was extremely brief (Doc. 189). In addition, Plaintiffs filed a statement of contested material facts in paragraph form, which contained citations to evidentiary materials in the record (Doc. 191). Defendant responded in a separate paper that addressed each paragraph of Plaintiffs' statement with corresponding cites to the record (Doc. 247). The following account of the material facts of this case is taken from this Court's March 28, 2003 order (Doc. 177), the parties' joint statement, from the facts asserted by Plaintiffs which Defendant does not deny, and from the documents filed by both parties in connection with this motion.

[3]All exhibits filed by Defendant in connection with the motion will be referred to as "Def.'s Ex. ___." Similarly, all exhibits filed by Plaintiffs in connection with this motion will be referred to as "Pls.' Ex. ___."

"Neighborhood Sales Offices" ("NSO") (*Id.* at ¶ 3). In 1984, Allstate introduced the Neighborhood Office Agent Program ("NOA") in response to flat productivity and the aggressive use of local independent contractor sales agents by its competitors (*Id.* at ¶ 4). These agents were accorded greater entrepreneurial discretion than the NSO program until September 1998 when Allstate agreed, after protracted negotiations with the Internal Revenue Service, to exert more control over the NOA program in order maintain the employee status of the program for tax purposes (*Id.* at ¶ 5).

In 1990, Allstate introduced the Exclusive Agency ("EA") program (*Id.* at ¶ 6). Under the EA program, new agents were typically employed under the R3000 contract under which they were employee agents for 18 months (*Id.*). After 18 months, if the agent met certain Allstate requirements as well as final company approval, the agent was offered the R3001 EA contract to represent Allstate as an independent contractor (*Id.* at ¶ 7). This program differed from Allstate's other agent programs in several respects: (1) EA agents were independent contractors, not at-will employees (*Id.* at ¶ 7); (2) EA agents acquired an economic interest in the business that they wrote as EA agents ("books of business") (*Id.* at ¶ 8); (3) EA agents received a higher commission schedule (*Id.* at ¶ 10); and (4) EA agents were not eligible to participate in Allstate's employee benefits plan (*Id.* at ¶ 11).

By January 1999, Allstate's agent sales force had evolved into at least six different programs, including (1) "R830 NSO Agents"; (2) "R830 GA Agents"; (3) "R830 NOA Agents"; (4) "R1500 NOA Agents"; (5) "R3000 EA Agents"; and (6) "R3001 EA Agents" *(Id.* at ¶ 16). In addition, Allstate's relationship with each of

these agent was governed by at least four different written contracts: (1) the transitional "Allstate R3000 Exclusive Agent Employment Agreement," otherwise known as the "R3000 Agreement"; (2) the "Allstate R3001 Neighborhood Exclusive Agency Agreement," otherwise known as the "R3001 Agreement"; (3) the "Allstate Agent Compensation Agreement," otherwise known as the "R830 Agreement,"; (4) the "Agent Employment Agreement," otherwise known as the "R1500 Agreement." (*Id.* at ¶ 17).

Allstate employed both Plaintiffs as employee insurance agents under the latter two contracts. Plaintiff Isbell, a fifty-four year old woman, worked for Allstate pursuant to an "R1500" employment contract from October 12, 1985 until June 30, 2000 (Doc. 189, ¶ 1). Similarly, Plaintiff Schneider, a fifty year old man, worked for Allstate pursuant to an "R830" contract from April 1984 until June 30, 2000 (Doc. 189, ¶ 2). For all practical purposes, these contracts had similar features, including a provision that Allstate could terminate them at will (Doc. 177 at 3).

In November 1999, Allstate publicly announced that it was launching a companywide "Preparing for the Future" Group Reorganization Program ("Program") (Doc. 177 at 3). The Program, which applied in Illinois, introduced a plan to change the nature of its business relationship with those persons who sold Allstate insurance (*Id.*). Essentially, Allstate would no longer sell its insurance though employees, who received company benefits, but would do so through a network of exclusive independent contractors (*Id.*). As part of this Program, Allstate announced that it

would terminate all of its approximately 6,400 employee agent contracts as of June 30, 2000 (Doc. 189, ¶ 3). The termination decision affected all employees agents across-the-board regardless of age, productivity, performance, or any other criteria, and regardless of whether they subsequently signed any release (Def.'s Ex. 1, Attachment A).

As part of the Program, Allstate presented each affected employee with written information outlining four options for its discontinued employee agent contracts, two of which allowed the employee to continue selling Allstate insurance as an independent contractor (Doc. 189, ¶ 4, Def.'s Ex. 1, Attachment A). Each individual employee agent was then given more than six months to select, in his or her sole discretion, among the following options (Def.'s Ex. 1):

> **Option 1 ("Independent Contractor Option"):** Under this option, the terminated employee agent could chose to become an independent contractor Exclusive Agent under an R3001S/C contract. In exchange for a release of specific claims, former agents who elected to become an independent contractor Exclusive Agent also received the following consideration and benefits, among others:
>
> - The ability to enter into a new contractual relationship with Allstate;
> - An opportunity to earn a transferable economic interest in their book of business, including the portion previously written as an employee agent, after only two years;
> - A conversion bonus of at least $5,000;
> - Forgiveness of any debts from office expense allowance advances (that otherwise would need to be repaid upon termination);
> - Higher commissions and participation in a stock bonus plan;
> - Moving expenses if relocation was required; and
> - The opportunity to grow their business and expand

> in new ways including setting up local agency extensions and, if qualified, expanding to satellite agency locations.

(*Id.* at ¶ 27(a)).

> **Option 2 ("Sale Option"):** The terminated employee could chose to become an independent contractor for a limited period of time and receive the following consideration and benefits, among others, in exchange for a release of specific claims:
>
> - Receive the right to enter into an R3001S/C Agreement and become an R3001 EA Agent;
> - Receive a bonus payment of $5000;
> - Have debt or OEA advances forgiven;
> - Be relieved of certain lease and advertising obligations incurred as an employee-agent;
> - Acquire in only one month a transferable economic interest in the business written while an employee-agent; and
> - Receive the right to sell his or her book of business, after one month's service as an R3001 EA Agent and prior to August 1, 2000, to an Allstate-approved buyer and then pocket the substantial sale proceeds.

(*Id.* at ¶ 27(b)).

> **Option 3 ("Enhanced Severance Option with Release"):** the terminated agent could choose to receive enhanced severance benefits equal to one year's pay based upon the greater of the 1997 or 1998 year-end authorized compensation in consideration and exchange for executing a release.

(Def.'s Ex. 1 at ¶ 27(c)).

> **Option 4 ("Base Severance Option Without Release"):** the terminated employee agent could chose not to sign a release and retain any or all claims they might have against Allstate, and receive base severance up to thirteen weeks.

(*Id.* at ¶ 27(d)). Schneider selected Option 2, the Sale Option (Def.'s Ex. 5, Schneider

Dep. at 97:25-98:7). Isbell selected Option 4, Base Severance Option Without Release (Def.'s Ex. 6, Isbell Dep. at 139:12-19).

Allstate also presented each employee agent, including Isbell and Schneider, with a release, an Election Form-Release, which purported to waive any right such employee might have to sue Allstate, pursuant to, among other things, the ADEA, Title VII, the ADA, and ERISA (Def.'s Ex. 3). Allstate also gave each affected employee with information that explained the implications of the Election Form-Release and encouraged them to consult with an attorney prior to signing it (Def.'s Ex. 1, Attachment B). In addition, Allstate provided to each affected agent, including Isbell and Schneider, the Age Discrimination in Employment ("ADEA") Waiver Information mandated by the Older Workers Benefits Protection Act ("OWBPA") (Def.'s Ex. 1, Attachment D).

In November or December 1999, Isbell and Schneider attended a meeting to explain the Program in Collinsville, Illinois (Def.'s Ex. 5, Schneider Dep. at 51:3-10; Def.'s Ex. 6, Isbell Dep. at 109:17-24). The meeting included a statement that all the agents' employment was terminated, but that over the next six months they could select one of the four options described above (Doc. 177 at 4). Both Isbell and Schneider admit that they understood that their positions were terminated pursuant to the Program (Def.'s Ex. 6, Isbell Dep. at 110:21-25, 112:12-18; Def.'s Ex. 4, Schneider EEOC charge). They admit that their contracts were not singled out for termination (Def.'s Ex. 6, Isbell Dep. at 149:7-9; Def.'s Ex. 5, Schneider Dep. at 54:1-11), and that they understood their contracts would terminate as of June 30, 2000,

regardless of whether they signed the Election Form-Release (Def.'s Ex. 6, Isbell Dep. at 110:21-25; Def.'s Ex. 5, Schneider Dep. at 88:14-17; 144:7-10; 145:24-146:2). It is also undisputed that R830 and R1500 contracts of employee agents over and under the age of 40 were terminated pursuant to the Program (Def.'s Ex. 6, Isbell Dep. at 144:13-15; Def.'s Ex. 1 at ¶ 26).

Plaintiff Schneider, unlike Isbell, chose to sign the Election Form-Release. Prior to signing, Schneider met with an attorney, Charles Stegmeyer, who advised him not to sign the release (Def.'s Ex. 5, Schneider Dep. at 64:1-22). Notwithstanding his attorney's advice, Schneider signed the release (Def.'s Ex. 5, Schneider Dep. at 85:5-8; 90:14-16). He selected Option 2, the Sale Option. In exchange, Allstate gave Schneider an economic interest in his book of business which he promptly sold on May 11, 2000 for $120,000 (Def.'s Ex. 5, Schneider Dep. at 90:14-16, 97:25-98:17). In addition, Allstate paid Schneider $ 5000 as additional consideration for signing the release (Def.'s Ex. 5, Schneider Dep. at 120:1-9). Allstate also forgave an outstanding advance (Def.'s Ex. 5, Schneider Dep. at 119:12-25).

Schneider understood he had seven days to revoke the release, but did not (Def.'s Ex. 5, Schneider Dep. at 102:6-15). He also admits that Allstate fully performed its promises in connection with his selection of Option 2 (Def.'s Ex. 5, Schneider Dep. at 122:4-9). Schneider retained and/or spent the financial benefits that he received in exchange for signing the Election Form-Release (Def.'s Ex. 5, Schneider Dep. at 119:1-121:18; 129:21-130:2). In September 2000, Schneider met

with another attorney, Kevin Boyne, regarding the Election Form- Release (Def.'s Ex. 5, Schneider Dep. at 125:8-10). Mr. Boyne told Schneider that the release did not bar any claim for workers' compensation that Schneider wished to bring against Allstate (Def.'s Ex. 5, Schneider Dep. at 70:6-18). Schneider then filed a workers' compensation claim in September 2000 in which he recovered almost $13,000 (Def.'s Ex. 5, Schneider Dep. at 70:9-71:10; Def.'s Ex. 12, Schneider's Workers' Compensation Settlement). Thereafter, on December 14, 2000, Schneider filed an EEOC charge alleging age discrimination and retaliation on (Def.'s Ex. 4, Schneider's EEOC charge).

III. Analysis

A. Summary Judgment Standard

Summary judgment is proper where the pleadings and affidavits, if any, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." **FED. R. CIV. P. 56(c); *Wyatt v. UNUM Life Ins. Co. of Am.*, 223 F.3d 543, 545 (7th Cir. 2000); *Oates v. Discovery Zone*, 116 F.3d 1161, 1165 (7th Cir. 1997) (citing *Chelates Corp. v. Citrate*, 477 U.S. 317, 322 (1986))**. The movant bears the burden of establishing the absence of factual issues and entitlement to judgment as a matter of law. ***Wollin v. Gondert*, 192 F.3d 616, 621-22 (7th Cir. 1999)**. The Court must consider the entire record, drawing reasonable inferences and resolving factual disputes in favor of the non-movant. ***Schneiker v. Fortis Ins. Co.*, 200 F.3d 1055, 1057 (7th Cir.**

2000); *Baron v. City of Highland Park,* 195 F.3d 333, 337-38 (7th Cir. 1999).

In reviewing a summary judgment motion, the Court does not determine the truth of asserted matters, but rather decides whether there is a genuine factual issue for trial. ***EEOC v. Sears, Robuck & Co.,* 233 F.3d 432, 436 (7th Cir. 2000)**. No issue remains for trial "unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not sufficiently probative, summary judgment may be granted." ***Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50 (1986)**. **Accord *Starzenski v. City of Elkhart,* 87 F.3d 872, 880 (7th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997); *Tolle v. Carroll Touch, Inc.,* 23 F.3d 174, 178 (7th Cir. 1994)**.

This standard should be "applied with added rigor" in employment discrimination cases, in which intent and credibility are crucial issues. ***Webb v. Clyde L. Choate Mental Health & Dev. Ctr.,* 230 F.3d 991, 997 (7th Cir. 2000); *Miller v. Borden, Inc.*, 168 F.3d 308, 312 (7th Cir. 1999); *King v. Preferred Technical Group, Inc.,* 166 F.3d 887, 890 (7th Cir. 1999)**. This standard reflects the pronouncement that in employment discrimination cases, which often involve issues of motive and intent, summary judgment must be approached with caution. ***Huhn v. Koering Co.*, 718 F.2d 239, 242 (7th Cir. 1983)**. ***Huhn*** relied on an earlier case that recognized that, although summary judgment is improper in employment discrimination cases which involve the "weighing of conflicting

indications of motive and intent" where a plaintiff has no evidence of discriminatory motive to "put on the scales for weighing," summary judgment is appropriate. ***Id.***

B. Schneider's Claims for Retaliation

In his Complaint, Schneider claims that Allstate's actions constituted retaliation in violation of four federal statutes: ADEA, **29 U.S.C. §§ 621 *et seq.***; ERISA, **29 U.S.C. §§ 1140 *et seq.***; Title VII, **42 U.S.C. § 2000e**; and ADA, **42 U.S.C. §§ 12101 *et seq.*** (No. 01-CV-0655, Doc. 1, ¶ 24). Allstate now moves for summary judgment on these claims because they rest on the same theory of retaliation advanced by Plaintiff Isbell and rejected by the Court in its March 28, 2003 Order (Doc. 177).

In its March 28, 2003 Order, the Court found the "adverse employment action of which [Isbell] complains was effectuated by Defendant long before she engaged in any protected activity." (Doc. 177 at 13). Moreover, Isbell "was not treated differently from other similarly situated employees. She was treated identically. The record is clear that all of the over 6,000 Allstate employee agents were terminated, and all were offered the same four options for what would happen after Allstate eliminated the job classification of 'employee agent.'" (Doc. 177 at 13). Thus, the Court held "the record is devoid of evidence sufficient to demonstrate that Defendant subjected [Isbell] to an 'adverse employment action' as a way for retaliating against her for signing the waiver or filing an EEOC charge." (Doc. 177 at 14).

Here, the Court finds that the undisputed facts in connection with

Schneider's retaliation claims weigh even more strongly in favor of summary judgment than those in Isbell's case. First, unlike Isbell who rests her retaliation claims, in part, on her refusal to sign the Election Form-Release, Schneider signed the Election Form-Release in April 2000 after consulting with an attorney (Def.'s Ex. 5, Schneider Dep. at 59:8-15; 64:1-4; 76:2-4). Second, unlike Isbell, Schneider did not file his EEOC charge until almost eight months after he signed the Election Form-Release, almost seven months after he sold his economic interest in the book of business for $120,000, and almost three months after he successfully filed a workers' compensation claim against Allstate (Def.'s Ex. 4, Schneider's EEOC charge). Schneider has not demonstrated why his claim is distinguishable from Isbell's. Under these facts, and for the reasons set forth in this Court's March 28 Order, the Court cannot find that Allstate took an "adverse employment action" against Schneider in retaliation for signing the waiver and/or filing an EEOC charge.

Further, the Court declines to entertain Plaintiffs' request to reconsider its March 28, 2003 ruling. The Seventh Circuit has explained that "'[m]otions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence.'" ***Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996)(citation omitted); *see also Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990)**. In order to succeed on a motion for reconsider, a plaintiff must either (1) present newly discovered evidence; or (2) establish a manifest error of fact or law.

***See Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)**. Here, Plaintiffs have offered neither new law nor new facts. Nor have they suggested that the Court made a manifest error of law or fact. The Court will not allow Plaintiffs to continue to relitigate the same issues under the guise of a summary judgment motion. Accordingly, the Court declines to reconsider its previous ruling and finds Allstate is entitled to judgment as a matter of law on Schneider's federal retaliation claims.

C. Schneider's ADEA, Title VII, ERISA, and ADA Claims

1. Schneider's Waiver of his ADEA, Title VII, ERISA, and ADA Claims

Allstate argues that Schneider's waived his ADEA, Title VII, ERISA, and ADA claims by signing the Election Form-Release. Under the Program, Allstate offered each affected agent the same four post-employment termination options (Doc. 177 at 4). One option, the base severance option, did not require a signed Election Form-Release (*Id.*). The other three options required the terminated employee to sign an Election Form-Release, which provided:

> In return for consideration that I am receiving under the Program, I hereby release, waive and forever discharge Allstate . . . from any and all liability . . . arising out of, connected with, or related to, my employment and/or termination of my employment . . . including any claim for age or other types of discrimination prohibited under the Age Discrimination in Employment Act of 1967, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Employment Retirement Income Security Act ("ERISA") . . .

(Def.'s Ex. 3). Schneider selected Option 2 and signed the Election Form-Release on April 24, 2000.

a. Waiver of ERISA, Title VII, and ADA Claims

In response to Defendant's summary judgment motion, Schneider "does not dispute Defendant's claim [that he] ratified the Release and Waiver as to his non-ADEA claims." (Doc. 190 at 18 n.3). Thus, even if the Election Form-Release was invalid at the time Schneider signed it, he subsequently ratified it by receiving and retaining over $120,000 in financial benefits and admits this in his response. This admission is dispositive as to Schneider's waiver of his ERISA, Title VII, and ADA claims. ***See Fleming v. United States Postal Serv. AMF O'Hare*, 27 F.3d 259, 260 (7th Cir. 1994) (ratification defense bars Title VII claim); *Maloney v. R.R. Donnelley & Sons Co.*, 1999 WL 58551, at *7 (N.D. Ill. Feb. 3, 1999)(Conlon, J.) (by retaining the benefits of signing the release plaintiff ratified the release and could not escape release's bar of his claims)**. Accordingly, the Court finds Schneider waived his ERISA, Title VII, and ADA claims as a matter of law.[4]

b. Waiver of ADEA claims

While employees are also free to waive their ADEA rights, the waivers must comply with the Older Workers Benefits Protection Act ("OWBPA"). ***Lloyd v. Brunswick Corp.*, 180 F.3d 893, 895 (7th Cir. 1999)**. Indeed, waivers are enforceable under the OWBPA only if they are entered into knowingly and voluntarily.

[4]Even though the Court finds Schneider waived his ERISA claim, the Court will consider the substance of the claim below.

***Blackwell v. Cole Taylor Bank*, 152 F.3d 666, 669 (7th Cir. 1998)**. At a minimum, the following requirements must be met: (a) the waiver must be part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual; (b) the waiver must specifically refer to rights or claims arising under this chapter; (c) the waiver must be limited to rights or claims arising before the waiver is executed; (d) the individual must be given consideration over and above what the individual already is entitled to; (e) the individual must be advised in writing to consult an attorney prior to executing the agreement; (f) the individual must be given a set period of days to consider the agreement; and (g) the individual must be allowed to revoke the waiver within 7 days after its execution. ***Lloyd v. Brunswick Corp.*, 180 F.3d at 896 (citing 29 U.S.C. § 626(f)(1))**. The OWBPA further provides that "if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class employees," each employee must be "given a period of at least 45 days within which to consider the agreement," as well as detailed information concerning eligibility for the program and other factors bearing on an informed choice of whether to participate in it. **29 U.S.C. § 626(f)(1)(F)(ii), (H)**.

Here, Schneider does not dispute that Allstate complied with OWBPA, but argues that his release was not voluntary or knowing. Specifically, Schneider asserts that there was no negotiation, he was unsure of the legal effect of signing release, and he was under duress. In considering whether the release was knowing and voluntary,

courts apply the totality of the circumstances standard. Thus, courts look at the following factors: (1) the employee's education and business experience; (2) the employee's input in negotiating the agreement; (3) the clarity of the agreement; (4) the amount of time the employee had for deliberation before signing the release; (5) whether the employee actually read the release and considered its terms before signing it; (6) whether the employee was represented by counsel or consulted with an attorney; (7) whether the consideration given in exchange for the waiver exceeded the benefits to which the employee was already entitled by contract law; and (8) whether the employee's release was induced by improper conduct on defendant's part. ***Pierce v. Atchinson, Topeka, & Santa Fe Ry. Co.*, 65 F.3d 562, 571 (7th Cir. 1995)**.

In this case, the Court finds that the undisputed facts and circumstances, establish that Schneider's waiver was knowing and voluntary. The Election Form-Release is unambiguous, and indeed emphatic, that it released all of Schneider's discrimination claims. Schneider, a college graduate and an experienced businessman, had over fifteen years experience as an insurance agent (Def.'s Ex. 5, Schneider Dep. at 7:21-25; 8:17-18; 8:23-25). In November 1999, when Allstate informed Schneider that his contract with Allstate was terminated and that he could chose one of four post-termination options, Schneider carefully reviewed the Election Form-Release and considered his options for more than six months (Def.'s Ex. 5, Schneider Dep. at 59:8-25; 75:12-76:15; 97:19-98:7). Further, Schneider consulted with an attorney who recommended against signing the release (Def.'s Ex. 5, Schneider Dep. at 59:8-18; 64:1-4). Against the attorney's advice, Schneider signed the Election

Form-Release on April 24, 2000 (Def.'s Ex. 5, Schneider Dep. at 90:14-16). In exchange, Schneider received economic benefit from Allstate, including: (1) an economic interest in the book of business, which he did have as employee agent (Def.'s Ex. 5, Schneider Dep. at 24:8-22); (2) the ability to sell his newly acquired economic interest in his book of business for $120,000; (3) a conversion payment of $5,000; and (4) forgiveness of an earlier advance made to Schneider for his Office Expense Allowance (Def.'s Ex. 5, Schneider Dep. at 121:1-20). Lastly, Schneider admits that Allstate fully performed its obligations (Def.'s Ex. 5, Schneider Dep. at 122:4-9).

Schneider responds to this overwhelming evidence by arguing that he "had absolutely no input in negotiating the terms of the agreement." (Doc. 190 at 19). Allstate does not dispute this. However, this fact standing alone does not mean, without more, that consent was unknowing and involuntary. ***See Fortino v. Quasar Co.*, 950 F.2d 389, 395 (7th Cir. 1991)(holding lack of negotiation cannot be the sine qua non of an effective waiver)*; see also Rivera-Flores v. Bristol-Myers Squibb Carribean*, 112 F.3d 9, 13 (1st Cir. 1997)(concluding that although there was little room for negotiation with respect to release signed by laborer, consent was knowing and voluntary)**. Likewise, Schneider's statement that he was "unsure of the legal effect of signing the release" fails to create a genuine issue of material fact (Doc. 190 at 19). The Court notes that it finds it hard to believe that Schneider was confused as to whether he could pursue an ADEA claim, when the plain language of the Election Form-Release states he could not. It is also clear that Schneider

understood, as a result of Allstate's urging, that he had the opportunity to obtain counsel regarding his purported questions about the legal effect of the Election Form-Release. In any event, even a mistaken belief as to the legal effect of a release cannot be a basis on which to void a release, "otherwise no releases, no accords and satisfactions, no contracts, period, would be enforceable against a party who became dissatisfied with the deal he had struck." ***Fortino v. Quasar Co.*, 950 F.2d 389, 394-395 (7th Cir. 1991)**.

The Court also finds Schneider's defense of duress unavailing as a matter of law. Schneider testified that "[t]he duress that I was under was I didn't feel like I had a choice in signing [the Election Form-Release] or not. If I didn't sign it I was terminated, if I did sign it my life was basically turned upside down anyway as far as financial capabilities, as far as continuing with Allstate." (Def.'s Ex. 5, Schneider Dep. at 88:21-25). In essence, Schneider's defense boils down to his concerns that the termination would result in financial hardship. In Illinois, economic duress is present "when one is induced by a wrongful act of another to make a contract under circumstances which deprive him of the exercise of free will, and a contract executed under duress is voidable." ***Resolution Trust Corp. v. Ruggiero*, 977 F.2d 309, 313 (7th Cir. 1992)(citation omitted)**. In order to prevail on a claim of economic duress, Schneider must demonstrate Allstate's wrongful conduct left him "bereft of the quality of mind essential to making a contract." ***Id.* (citation omitted)**.

Under these facts, the Court concludes that Schneider's personal

economic burdens do not rise to the level of "duress" for purpose of invalidating a termination release. ***See Grant v. Potter*, 2002 WL 535093, at * 6 (N.D. Ill. April 10, 2002)(Darrah, J.)("fact that [plaintiff] needed a job to meet her financial obligations does not establish the defense of duress")**. Here, Schneider had a choice between four different alternatives, two of which allowed him to stay with Allstate, and another which allowed him to forgo signing the release. Schneider chose the former. He cannot now claim, after he received the benefit of that bargain, that he was pushed into the decision. ***See Pierce*, 65 F.3d at 569 ("one cannot successfully claim duress as a defense to a contract when he had an alternative to signing the agreement.")**.[5] Accordingly, the Court finds that Schneider signed a valid waiver with respect to his ADEA claims. However, for completeness sake, the Court will assume that the waiver was not valid, and consider Schneider and Isbell's discrimination claims.

2. Statute of Limitations

Allstate also argues that Schneider's claims are barred by the statute of limitation. Title VII and ADEA do delineate certain prerequisites before an individual may sue. For one thing, a plaintiff must file a charge with the EEOC within 300 days of the alleged discriminatory act. ***See* 42 U.S.C. § 2000e-5(a); 29 U.S.C. § 626(d)(2); *see also Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 449 (7th 1990)**. The limitations period begins to run from the communication of the termination decision

[5]Schneider's assertion that Allstate "cleverly hid its discriminatory intent" is legally irrelevant to the issue of duress.

to the employee. ***Del. State College v. Ricks*, 449 U.S. 250, 258 (1980)**; ***Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 267 (7th Cir. 1995)**.

Here, Allstate announced the Program to Schneider, and the rest of the affected employee agents, in November 1999. Yet Schneider did not file his charge with the EEOC until over 360 days later, on December 14, 2000 (Def.'s Ex. 4). Schneider now tries to defeat the explicit time limitations by claiming he learned of the termination in late winter, early spring (Schneider Decl. at ¶ 4). While the Court agrees with Allstate that the statute of limitation began to run when Schneider learned of his impending termination in the Fall of 1999 and thus are untimely, the Court will go on to consider the substance of Schneider's claims.

D. Schneider and Isbell's Discrimination Claims

1. ADEA

The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." **29 U.S.C. § 623(a)(1)**. Under a disparate treatment theory, as is the case here, plaintiffs must prove that their age "'actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.'" ***Balderston v. Fairbanks Morse Engine Division of Coltec Indus.*, 328 F.3d 309, 321 (7th Cir. 2003)(citing *Reeves v. Anderson Plumbing Prod., Inc.*, 530 U.S. 133, 141 (2000)(citation omitted))**. Stated differently, to succeed on an

ADEA claim, a plaintiff must establish that he would not have been terminated "but for" his employer's intentional age-based discrimination. ***Id.*** **(citing *Chiaramonte Bed Group., Inc.,* 129 F.3d 391, 396 (7th Cir. 1997))**.

To prove age discrimination, a plaintiff may present either direct or circumstantial evidence. ***Id.*** Most often, direct evidence "requires an admission by the decisionmaker that his actions were based on age." ***Id.*** Here, Plaintiffs have not presented any direct evidence of discrimination, rather Plaintiffs' case consists entirely of circumstantial evidence. While the Seventh Circuit has recently indicated, "[w]here circumstantial evidence of discriminatory intent is relied on, generally the burden shifting [or indirect] method of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, is applied" ***Id.*** **(citing *Reeves*, 530 U.S. at 142)**, prior precedent indicates that the direct method may apply. ***See Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994)**. Thus, the Court will analyze Plaintiffs' claims under both methods.

a. Direct Method

Under the direct proof method, plaintiffs may show either acknowledgment of discriminatory intent by defendant or its agents or circumstantial evidence the provides the basis for an inference of intentional discrimination. ***See Troupe*, 20 F.3d at 736**. There are three types of circumstantial evidence of intention discrimination: (1) "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other

bits and pieces from which an inference of discriminatory intent might be drawn" ***Id.*** **(citing *Giacoletto v. Amax Zinc Co.*, 954 F.2d 424 (7th Cir. 1992); *Holland v. Jefferson National Life Ins. Co.*, 883 F.2d 1307, 1314-15 (7th Cir. 1989))**; (2) "evidence, whether or not rigorously statistical, that employees similarly situated to the plaintiff other than in the characteristic (pregnancy, sex, race, or whatever) on which an employer is forbidden to base a difference in treatment received systematically better treatment;" ***Id.*** **(citing *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 728 (7th Cir. 1986))**; (3) "evidence that the plaintiff was qualified for the job in question but passed over in favor of (or replaced by) a person not having the forbidden characteristics and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination." ***Id.*** **(citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, — (1993); *Ayala v. Mayfair Molded Products Corp.*, 831 F.2d 1314, 1318 (7th Cir. 1987))**. "Each type of evidence is sufficient by itself (depending of course on its strength in relation to whatever other evidence is in the case) to support a judgment for the plaintiff; or they can be used together." ***Id.***

Plaintiffs in this case did not present any circumstantial evidence of the second or third type – that is, either comparative or pretext. Rather, Plaintiffs evidence consists of random bits and pieces of information generated in connection with a series of earlier initiatives not directly related to the Program, including a study commissioned by Allstate in 1996 regarding agent productivity and the sales organization of the future ("SOOF") initiative in 1997-1998. Plaintiffs allege that this

evidence demonstrates that Allstate unlawfully correlated age with productivity, and thus can be used as direct evidence of discrimination. Among other things, Plaintiffs point to Powerpoint presentations created in connection with the 1996 study that correlates a slight decline in productivity with age (Pls' Ex. 2) and states "there is a potential generational mismatch between [Allstate] agents and the new customers [Allstate] seeks" (Pls' Ex. 1). Plaintiffs also rely extensively on presentations generated by an outside consultant, McKinsey Company, in connection with the SOOF initiative arguing that these served as precedent to Allstate's decision to convert the agent workforce to independent contractors.

The Court finds, however, that Plaintiffs have failed as a matter of law to provide evidence to support an inference of intentional discrimination. As an initial matter, many of the documents Plaintiffs rely on were generated by outside consultants, not Allstate (*See, e.g.*, Pls.' Ex. 7-19, 22-24, 26-27). But more importantly, Plaintiffs have failed to show how these documents, many marked draft, can be attributed to the employment decision challenged in this case. ***See Cowan v. Glenbrook Sec. Servs., Inc.*, 123 F.3d 438, 443 (7th Cir. 1997)("This evidence 'must not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question.'")** To the contrary, the undisputed evidence shows that in November 1999, Allstate decided to restructure its sales force (Doc. 177 at 3). As part of this Program, Allstate terminated all of its 6,000 employee agent contracts and offered those employees the choice to continue to

work for Allstate as independent contractors. (*Id.* at 4). The Court finds the record does not support the conclusion that Allstate implemented the Program in order to "get rid of older agents" because it believed they were "less productive," but offered the same affected agents the opportunity to become Allstate exclusive agent independent contractors. Furthermore, there is no evidence that Plaintiffs' proffered documents were used by any Allstate decisionmaker to implement the Program. ***See Hunt v. City of Markham, Illinois*, 219 F.3d 649, 652 (7th Cir. 2000)("The fact that someone who is not involved in the employment decision of which the plaintiff complains expressed discriminatory feelings is not evidence that the decision had a discriminatory motivation. That is simple common sense.")** In sum, the Court finds that no rational trier of fact could reasonably infer from the evidence that Allstate fired Plaintiffs because the latter were members of a protected class, in this case the class of those over the age of 40.

The Court's conclusion is not changed by the four exhibits offered by Plaintiffs in their Motion to Amend and Supplement Plaintiffs' Combined Memorandum in Opposition to Defendant's Motion for Summary Judgment Against Doris Isbell and Defendant's Motion for Summary Judgment Against James Schneider (Doc. 269). Assuming these exhibits are properly before the Court, Plaintiffs have not shown why the composition of Allstate's call center workforce is relevant to Allstate's decision to restructure its insurance agent workforce. This job classification existed before Allstate decided to restructure its agent workforce. There is no evidence that

the call-center employees replaced the terminated agents or that they even had the similar job requirements. Similarly, the Court rejects Plaintiffs assertion, exemplified in Exhibit 4, that Allstate's decision was somehow motivated by the disproportionate numbers of those over the age of 40 then employed as sales agents. The uncontroverted evidence establishes that all employee agents were terminated regardless of age. The antidiscrimination laws were not meant to bind an employer to a particular business model that is unproductive or not cost effective because the composition of an employer's workforce disproportionately favors a particular group. Accordingly, the Court cannot conclude that Plaintiffs produced sufficient circumstantial evidence under the "direct method" to raise a triable issue on their claims.

b. Indirect Method

Under the ***McDonnell Douglas*** approach, a plaintiff-employee must first establish a *prima facie* case of employment discrimination. "This requires proof of four elements: (1) the employee is a member of the protected class (in an ADEA case, employees over 40 years of age, *see* 29 U.S.C. § 631(a)); (2) the employee was performing at a satisfactory level; (3) the employee was subject to an adverse employment action; and (4) the employee was treated less favorably than younger, similarly situated employees." ***Schuster v. Lucent Technologies, Inc.*, 327 F.3d**

569, 574 (7th Cir. 2003). If the plaintiff succeeds in making out *prima facie* case,[6] the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action. ***McDonnell Douglas*, 411 U.S. at 802**. If the employer can offer such a reason, "the plaintiff . . . bears the ultimate burden of showing that it is pretext for discrimination." ***Schuster*, 327 F.3d at 574 (citing *Krchnavy v. Limagrain Genetics Corp.*, 294 F.3d 871, 876 (7th Cir. 2002))**. "'To show pretext in a RIF case, an employee must establish that an improper motive tipped the balance in favor of discharge' or that 'the employer did not honestly believe in the reasons it gave for firing him.'" ***Id.***

Here, Plaintiffs cannot establish the fourth factor of their prima facie case– that they were treated differently than similarly situated persons outside the protected class. It is undisputed that the contracts of affected employee agents younger than 40 years old were also terminated as part of the Program (Def.'s Ex. 1 at ¶ 26; Def.'s Ex. 2 at ¶¶ 6, 10). Indeed, this Court has already held that "[p]laintiff [Isbell] was not treated differently from other similarly situated employees. She was treated identically. The record is clear that all of the over 6,000 Allstate employee agents were terminated, and all were offered the same four options for what would happen after Allstate eliminated the job classification of 'employee agent." (Doc. 177 at 13).

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[6]A plaintiff may not jettison the *prima facie* analysis and move directly to the pretext inquiry. To the contrary, this Circuit has held that "[i]f a plaintiff is unable to establish a *prima facie* case of employment discrimination under *McDonnell Douglas*, an employer may not be subject to a pretext inquiry." ***Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 327 (7th Cir. 2002)**.

Plaintiffs admit that they were treated identically to the other 6,000 employee agents affected by the Program (Def.'s Ex. 6, Isbell Dep. at 149:10-17; Def.'s Ex. 5, Schneider Dep. at 54:5-11). Therefore, Plaintiffs' age discrimination claims fail as a matter of law. ***See Bennington v. Caterpillar, Inc.*, 275 F.3d 654, 659 (7th Cir. 2001)(plaintiff cannot establish a violation of the ADEA if he cannot put forth evidence that similarly situated employees were treated more favorably); *Harris v. Franklin-Williamson Human Servs., Inc.*, 97 F. Supp.2d 892, 905 (S.D. Ill. 2000)(Herndon, J.)(rejecting discrimination claim where plaintiffs could not prove similarly situated employees outside the class were treated more favorably)**.

The Seventh Circuit's holding in ***Blackwell*, 125 F.3d 666 (7th Cir. 1998)**, further supports the Court's finding. In ***Blackwell***, the defendant bank decided to eliminate the position of branch manager. At the time of this decision, there were seven branch managers, five of whom were over 40 (plaintiffs), and two who were under 40. As part of its reorganization, the bank offered to all of the branch managers the opportunity to enter into a new position with the company, or to quit early. In affirming summary judgment in favor of the employer on plaintiffs' claims of age discrimination, the ***Blackwell*** court considered as dispositive the fact that while *some* of the terminated branch managers were under 40 years old and *some* were in the protected class, "all were subjected to the change and all decided to quit." ***Id.* at 671**. The Court held that if "jobs are abolished by a reduction in force, or if job classifications are abolished, the workers competing to remain employed are in the

same position as workers applying for a new job." ***Id.* at 672**. Under these circumstance, older workers simply "have no entitlement to preferential consideration for these jobs." Here, the "bank created a new job and offered it to the incumbents of the old jobs whatever their age, all of whom, again *whatever their age*, turned it down." ***Id.*** The Court concluded that "job was the plaintiffs' for the asking" and they cannot complain that they were discriminated against if the job went to other persons after the rejected them. ***Id.*** Simply put, the Court finds that as in ***Blackwell***, Plaintiffs have not stated a valid claim of ADEA discrimination.

2. ERISA

Section 510 of ERISA provides, in pertinent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a beneficiary for exercising any right to which he is entitled under the provision of an employee benefit plan.

29 U.S.C. § 1140. In enacting section 510, Congress' primary aim was to prevent "'unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights'" or other benefits. ***Meredith v. Navistar Int'l Transp. Corp*, 935 F.2d 124, 127 (7th Cir. 1991) (quoting *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 237 (4th Cir. 1991))**.

Thus, section 510 of ERISA protects employees against dismissal by employers who seek to limit costs of health benefits by preventing the use of such benefits. ***Lindeman v. Mobil Oil Corp.*, 141 F.3d 290, 295 (7th Cir. 1998)**.

To prove a violation of section 510, plaintiffs must demonstrate that their employers terminated them with the specific intent of preventing or retaliating for the use of benefits. ***See Little v. Cox's Supermarkets*, 71 F.3d 637, 642 n.3 (7th Cir. 1995)**. In other words, "plaintiff must ultimately show that a desire to frustrate [the plaintiff's] attainment or enjoyment of benefit rights contributed toward the employer's decision and [the plaintiff] can avoid summary judgment only if the materials properly before the district court, construed sympathetically, allow for such a conclusion." ***Id.*** Further, when establishing intent under section 510 of ERISA, proof of pretext is required. ***Id.* at 643**. Such proof may be direct of circumstantial. ***Id.***

Circumstantial evidence of discrimination can be presented through the burden-shifting analysis set forth in ***McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-4 (1973)**, and applied by the Seventh Circuit in ***Grottkau v. Sky Climber, Inc.*, 79 F.3d 70, 73 (7th Cir. 1996)**. ***Lindemann* v. Mobil Oil Corp., 141 F.3d 290, 296 (7th Cir. 1998)**. To make out a prima facie case under section 510, plaintiff must show that he (1) belongs to the protected class; (2) was qualified for his job position; and (3) was discharged or denied employment under circumstances that provide little basis for believing that the prohibited intent to retaliate was present. ***Id.* (citation omitted)**. "However, it is unnecessary for this Court to determine whether a plaintiff has established a prima facie case where a defendant has advanced a legitimate, nondiscriminatory reason for his action. ***See***

Grottkau,* 79 F.3d at 73**. 'Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did is no longer relevant. ***Id.* (quoting *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983)).'" *Id.

As stated earlier, the Court has already found that Allstate established that Isbell and Schneider were dismissed as part of a restructuring of its agent sales force - a legitimate nondiscriminatory reason (Doc. 177).[7] Plaintiffs have offered no evidence to show Allstate's decision was impermissibly motivated by a desire to deprive those agents of their health care benefits. Indeed, the documents offered by Plaintiffs suffer from the same infirmities as those offered in support of their ADEA claim, namely Plaintiffs fail to show how they even remotely relate to the employment decision in question. None of the documents Plaintiffs presented were created in connection with or refer to the Program. Nor were the documents shared with those initiating the Program. In short, Plaintiffs' evidence neither establishes the prima facie case nor demonstrates that Allstate's proffered legitimate, nondiscriminatory business reason for implementing the program was pretextual. No action for ERISA lies where, as here, the alleged loss of a right is a mere consequence of the employment termination. ***Lindemann*, 141 F.3d at 297; *Meredith,* 935 F.2d at 127**. Accordingly, the Court will deny Plaintiffs' ERISA

[7]Under the circumstances present here, the Court declines to use its discretion to require Plaintiffs to exhaust their administrative remedies as a prerequisite to bringing a civil action to enforce section 510 of ERISA. ***See Salus v. GTE Directories Serv. Corp.*, 104 F.3d 131, 138 (7th Cir. 1997)**.

claims.

E. Allstate's Counterclaim for Breach of Contract

Allstate claims that Schneider is liable for breach of contract in connection with his Election Form-Release. Under Illinois law, the elements of breach of contract are: (1) the existence of a valid and enforceable contract; (2) performance by plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to plaintiff. ***Henderson-Smith & Assoc., Inc. v. Nahamani Family Serv. Center, Inc.*, 752 N.E.2d 33, 43 (Ill App. Ct. 1st Dist. 2001)(citation omitted)**. The Court has already found the Election Form-Release was valid and enforceable. The plain language of the Release prevented Schneider from filing a lawsuit against Allstate pursuant to the ADEA, ERISA, ADA, and Title VII (Def.'s Ex. 3). Thus, Schneider breached the agreement by bringing the instant suit. It is also clear that Allstate fully performed its obligations under the contract (Def.'s Ex. 5, Schneider Dep. at 122:4-9). While the Court finds that Allstate has proven liability, it has not provided any proof in connection with the issue of damages. The Court therefore denies Allstate's motion without prejudice and reserves ruling on the issue of damages until a later date.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS in part** and **DENIES in part** Defendant Allstate's combined motion for summary judgment against Plaintiffs Doris Isbell and James Schneider (Doc. 187). The Court also **GRANTS** Plaintiffs'

motion to amend and supplement their opposition (Doc. 269). All other pending motions are **DENIED** as moot at this time. The parties are permitted to refile these motions to the extent that they relate to viable issues still before the Court. The Court also directs all parties to attend a conference on **Friday, December 19, 2003 at 10:00 a.m.** in order to discuss the remaining issues in the case and to set a schedule for their timely resolution.

IT IS SO ORDERED.

Signed this 25th day of November, 2003.

/s/ David R. Herndon
DAVID R. HERNDON
United States District Judge